EUROPEAN COMMUNITIES AND CERTAIN MEMBER STATES – MEASURES AFFECTING TRADE IN LARGE CIVIL AIRCRAFT: RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE UNITED STATES

ORAL STATEMENT OF THE UNITED STATES AT THE SUBSTANTIVE MEETING OF THE PANEL WITH THE PARTIES

April 16, 2013

1. What is most remarkable about this dispute is how little has changed in the last eight years. In spite of the longest, most complex WTO dispute ever, and the largest-ever findings of subsidization and serious prejudice, the EU has done nothing to change its WTO-inconsistent behavior. It has withdrawn only a few tiny subsidies, and has taken no meaningful steps to remove the adverse effects of the $15 billion in subsidized financing that it left untouched. And then, just as the original panel was completing its work, the EU granted Airbus more than $4 billion in subsidized financing for the A350 XWB with the same core terms as LA/MSF for earlier aircraft, and once again with a massive benefit.

2. The market situation has not changed in a meaningful way, either. Where subsidies caused Airbus's market share to skyrocket in the years leading up to 2006, they have allowed Airbus to retain that market share today. Thanks to subsidies, Airbus overcame major setbacks, including the A380 production and design flaws, the failure of its initial proposal for the A350, and the failure and premature end of the A340 program in 2011. Thanks to the EU's relentless subsidies, the U.S. large civil aircraft industry continues to lose billions of dollars' worth of sales and market share to Airbus every year.

3. Instead of taking meaningful compliance action, the EU seeks to convince the Panel that the same arguments it raised before the original Panel now justify inaction in the face of the DSB recommendations and rulings rejecting those arguments. Its arguments are certainly lengthy, but that does not mask their fundamental lack of substance. The EU's defense of its inactions rests in large part on novel legal theories, every single one of them invalid:

- The first of these is that subsidized loans are self-withdrawing: once the recipient repays the principal and below-market interest due under the subsidized loan, the WTO inconsistency evaporates. This is the EU's "removal of the financial contribution" theory.

- Where the original panel found that "the subsidies are, by any realistic measure, extremely large"[1] during the 2001-2006 time period, nearly all of the subsidies vanished over the past six years. This is the EU's "amortization" theory.

- A series of pre-2007 reorganizations and share transactions that the Appellate Body found not to have withdrawn any subsidies as of the end of 2006 somehow

[1] *EC – Large Civil Aircraft (Panel)*, para. 7.1967.

withdrew essentially all of them between 2007 and 2012.[2] This is the EU's "extinction and extraction" theory.

- They say LA/MSF for the A350 XWB, which has the same core terms as all previous instances of LA/MSF and also confers a benefit, actually lacks "commonality" with prior measures.[3] This is the EU's A350 XWB scope theory.

- They say the EU discharged its compliance obligation by letting Airbus deliver aircraft under orders the company won because of its subsidies. This is the EU's theory of how it removed adverse effects by simply letting those effects occur.

- And finally they say that the single-aisle, twin-aisle and very large aircraft markets, which the EU proposed and the Appellate Body endorsed, are in fact a multitude of separate markets, most of which have no competition between Boeing and Airbus products. This is the EU's "product market" theory.

These are some of the EU's errors. In the interest of leaving time for the Panel's questions, we cannot fully catalog all of them. That would take all day. Accordingly, we direct the Panel to our submissions with respect to any issues we might omit from this oral presentation.

4. Let's begin by reviewing the critical facts. Beginning with the A300, the EU member States gave Airbus subsidized financing for the development and production of every single one of its aircraft. The original panel found, and the Appellate Body confirmed, that in the absence of this financing, Airbus either would not exist today, or would at best be a much weaker competitor. Based on these findings, the original panel found, and again the Appellate Body confirmed, evidence of billions of dollars of lost market share and lost sales in the 2001-2006 period. The DSB then adopted recommendations and rulings in 2011 that the EU was causing adverse effects to U.S. interests through the use of subsidies. It recommended that the EU either withdraw the subsidies or take appropriate steps to remove their adverse effects.

5. Those recommendations and rulings bring us to the first point we want to emphasize today – the legal standard applicable to this dispute. Under Article 7.8 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"), the EU has an obligation to withdraw these subsidies or take appropriate steps to remove their adverse effects. As the complaining party in this proceeding, the United States has the burden of proof that the EU did not comply with this obligation. That requires a showing that the EU did not withdraw the subsidy or take appropriate steps to remove its adverse effects. The United States does not bear the burden of making an entirely *new* case with regard to the subsidies subject to the DSB recommendations and rulings. And it certainly does not bear the burden of showing *again* that they are subsidies, or *again* that they cause adverse effects. Those points were settled in the original dispute.

[2] *EC – Large Civil Aircraft (AB)*, para. 756.

[3] EU SWS, paras. 28, 29, 31, and 36.

6. We now move on to discuss the EU's failure to satisfy this obligation. I will address the EU's failure to withdraw the subsidies, the EU's erroneous assertions about the subsidies having come to an end, and new subsidies to the A350XWB. Mr. Janovitz will address prohibited subsidies and certain horizontal adverse effects issues. Mr. Jaffe will address the other adverse effects issues.

I. THE EU'S FAILURE TO WITHDRAW THE LA/MSF SUBSIDIES AND GRANT OF NEW SUBSIDIES FOR THE A350XWB

7. Our submissions have shown that none of the compliance steps announced by the EU withdrew the subsidies that the original panel and the Appellate Body found to exist. The EU has put forward no argument or evidence that successfully rebutted our demonstration. Therefore, the United States respectfully requests the Panel to find that the EU did not withdraw the LA/MSF or other subsidies.

A. The Standard for Evaluating an Alleged Withdrawal of Subsidies

8. Before addressing the EU's misplaced arguments with regard to the facts of this dispute, it is useful to first consider the framework for evaluating whether a Member has withdrawn its actionable subsidies. The Appellate Body has found that, as used in Article 7.8, "withdraw" means "to 'remove' or 'take away' and 'to take away what has been enjoyed; to take from.'"[4] It elaborated in *US – Upland Cotton* that this obligation implies "affirmative action" by the responding Member, which "would normally not be able to abstain from taking any action on the assumption that the subsidy will expire or that the adverse effects of the subsidy will dissipate on their own."[5]

9. In its second written submission, the EU argues that the "accrual and diminishment of the subsidy" by itself "accomplished withdrawal."[6] That is, of course, exactly what the Appellate Body found was *not* normally sufficient to withdraw a subsidy. The EU attempts to justify this negation of the Appellate Body's reasoning as necessary to harmonize the "affirmative action" finding in *US – Upland Cotton (21.5)* with the finding in *EC – Large Civil Aircraft* that a subsidy has a finite life that accrues and diminishes over time before finally coming to an end.[7] No such contortions are necessary. What the EU neglects to mention is that the Appellate Body explicitly found that the accrual and diminution of a subsidy is a matter for the analysis of the *effects* of the subsidy.[8] And the Appellate Body made its observation in *U.S. – Upland Cotton (21.5)* in response to an argument like that of the EU that a subsidy would expire when its benefit was used up, the same point acknowledged in *EC – Large Civil Aircraft*. Thus, the Appellate Body's

[4] *EC – Large Civil Aircraft (AB)*, para. 754.

[5] *US – Upland Cotton (21.5) (AB)*, para. 236.

[6] EU SWS, para. 86.

[7] EU SWS, para. 85.

[8] *EC – Large Civil Aircraft (AB)*, para. 714.

findings in *US – Upland Cotton (21.5)* and *EC – Large Civil Aircraft* can and should be read together to signify that affirmative actions are normally necessary to achieve withdrawal of a subsidy, but that the essentially passive accrual and diminution of a subsidy is a matter for the evaluation of adverse effects. The EU evidently disagrees with the Appellate Body's approach, but has not explained the basis for that disagreement or why the Panel should prefer the EU's approach.

B. The Measures Identified by the EU Did Not Withdraw Past LA/MSF.

10. Application of this analysis to the compliance measures identified by the EU establishes that they did not withdraw the subsidies found to exist.

1. Supposed Terminations of LA/MSF Contracts

11. Let's begin with the supposed terminations of LA/MSF contracts, which featured so prominently in the EU Notification. The United States demonstrated in its first written submission that these did not withdraw past subsidies. In its second written submission, the EU asserts that they are nonetheless an "additional piece of evidence" in which Airbus and the four member States "recogniz{e}" withdrawals allegedly achieved through other means.[9] The United States fails to see how a statement by Airbus and its government creditors about the WTO legal effect of their inaction would have any relevance to these proceedings, and the EU provides none. Therefore, the Panel should give no weight to this so-called "additional evidence."

2. Repayment of Loans on Subsidized Terms

12. The EU Notification also references repayment of LA/MSF as a compliance measure. The United States does not dispute that paying back in full the amount of a subsidy received would withdraw it. However, because the SCM Agreement defines a subsidy as the financial contribution that confers a benefit, any such "repayment" would have to take account of both the financial contribution and the subsidy element, namely, the below-market terms of the subsidy. There were no such repayments in this dispute, because all of the alleged repayments covered only the below-market interest rates charged by the EU member States.

13. The EU notes the Appellate Body's statement in *EC – Large Civil Aircraft* that "removal" of a financial contribution would end the life of a subsidy.[10] It then argues that Airbus's repayment of LA/MSF would "remove" the financial contribution. However, the Appellate Body did not equate "removal" of the financial contribution with repayment on subsidized terms of a loan. It simply referenced what it considered to be an agreement between the parties that repayment of the financial contribution and/or benefit may remove the subsidy. The United States did not endorse the view that repayment of the financial contribution alone would suffice. And indeed, before the Appellate Body, the EU itself stated that "once a financial

[9] EU SWS, para. 101.

[10] EU SWS, para. 105, *quoting EC – Large Civil Aircraft (AB)*, para. 709.

contribution is granted, the only element under Article 1 that can 'cease to exist' or be discontinued over time if there is a significant change…is the benefit'."[11]

3. Supposed End of the Life of the Subsidy

14. The EU Notification also speaks of bringing subsidies to an end through amortization as another compliance measure. The U.S. written submissions have explained why these arguments are invalid. In particular, the Appellate Body in *EC – Large Civil Aircraft* found that the end of the life of a subsidy and its consequences are part of the adverse effects analysis.[12] Indeed, under the EU's theory, a passive wait would *always* achieve withdrawal of a subsidy, thereby effectively negating the Appellate Body's observation that affirmative action is normally necessary.

15. The EU's only answer for this flaw in its argument is to cite the Appellate Body's observation that the question of withdrawal of a subsidy is "best left to a compliance panel."[13] This argument is a *non sequitur*. The fact that compliance panels are charged with evaluating whether a subsidy has been withdrawn provides no guidance as to how to conduct that evaluation. It certainly does not alter the Appellate Body's guidance that the question of withdrawal of subsidies is relevant to the adverse effects analysis, and not to the existence of the subsidy, and that inaction is normally not enough.

16. The EU also errs in treating amortization as the central or exclusive issue in measuring the life of a subsidy. Paradoxically, the EU begins by conceding that the amortization period for accounting purposes is merely one option to measure the life of a subsidy.[14] However, it then goes through a series of contortions to transform this "one option" into the centerpiece of the analysis. First, it asserts that "whether the finite life of the subsidy has ended, including through amortisation, is a *core question of compliance proceedings* under Article 7.8."[15] Then it raises the rhetoric still further by insisting that "amortisation is a crucial part of the case that a complaining party must make in compliance proceedings under Article 7.8."[16] But the statements do not logically follow. Where, as in this instance, the amortization period for accounting purposes is not the best measurement of the life of a subsidy, it is not a "core question," or "crucial". It is, to return to the Appellate Body's reasoning, merely one option.

17. It is also worth noting that, wherever the life of the subsidy fits in the analytical framework, the EU's proposals for measuring that life do not work for the types of subsidies in this proceeding. These subsidies were responsible for creating each Airbus aircraft program, and

[11] *EC – Large Civil Aircraft* , para. 699.

[12] *EC – Large Civil Aircraft (AB)*, para. 707.

[13] *EC – Large Civil Aircraft (AB)*, para. 758, *cited in* EU SWS, para. 131.

[14] EU SWS, para. 129.

[15] EU SWS, para. 131.

[16] EU SWS, para. 132.

payments under LA/MSF contracts in most cases continue over the actual life of the aircraft. Therefore, as the United States has explained, the life of the subsidy runs together with the life of the aircraft program.

18. The EU's efforts to rebut this conclusion are all misguided. First, the EU argues that the United States provided no evidence that payments extend through the actual life of an aircraft program.[17] This point is, however, beyond dispute, as the original panel found that all LA/MSF contracts provide for levy-based repayment obligations lasting as long as it takes to achieve full repayment at subsidized terms. It also found that a number of the LA/MSF contracts provided for royalty payments even after repayment of financing, and that these extended over the life of the aircraft program.[18] Economic realities also support this outcome. A rational economic actor that provided financing with repayment dependent on the sales of a product, without recourse to the assets of the recipient, would maintain that obligation until it received full repayment, without regard to some artificial expected life of the product.

19. The EU also argues that the U.S. approach requires an impermissible *ex post* analysis because the parties do not know at the time of the grant of LA/MSF how long the aircraft program will remain viable. However, the EU is mistaken. Commercial actors enter obligations with fixed, but indefinite, terms on a regular basis. One example might be a life tenancy in land, which allows the tenant to use the property for the entirety of the tenant's life. Another would be a requirements contract, under which one party agrees to provide the other whatever amount of an input that it needs. The payment for LA/MSF is contingent in just this way. Therefore, making the life of the subsidy contingent on the actual life of the aircraft mirrors a decision that commercial actors can and do make at the outset of a transaction. It does not involve an *ex post* analysis at all.

20. Thus, the EU's arguments regarding the life of the LA/MSF subsidies should be rejected. The Appellate Body has identified this question as a matter for the adverse effects analysis, and there is no reason to treat the essentially passive trajectory of the life of a subsidy as the kind of affirmative action normally required to withdraw a subsidy. Moreover, even if the life of the subsidy were relevant to the question of withdrawal, the United States has shown that the proper measurement of that life is the actual life of the subsidized aircraft program. The EU's efforts to shorten the lives of these subsidies by argument, rather than by withdrawing them, are invalid.

21. Finally, we note that the EU has already raised its amortization argument once before. In the original dispute, the EU submitted a report by its consultant ITR arguing for allocation of subsidies over the "anticipated marketing life," and that doing so established that most of the subsidies ended before the end of the reference period.[19] This did not stop the original panel from finding that all prior instances of LA/MSF were subsidies causing adverse effects during

[17] EU SWS, para. 144.

[18] *EC – Large Civil Aircraft (Panel)*, paras. 7.342, 7.374, and 7.404

[19] *EC – Large Civil Aircraft (Panel)*, para. 7.1963; *EC – Large Civil Aircraft*, EC First Written Submission, Expert Statement – ITR Subsidy Allocation, paras. 4-5, Table 4 (Exhibit EC-13) (BCI). .

the reference period. The EU's attempt to revive this argument before this Panel should not alter the conclusion that the subsidies have not amortized, and the EU has not withdrawn them.

4. Supposed Extinctions and Extractions

22. The EU devotes the largest part of its argument to transactions involving Airbus or EADS shares that supposedly "extinguished" subsidies or "extracted" them from Airbus. The U.S. submissions demonstrate that, as both a legal and factual matter, the transactions in question did neither. The EU has not advanced either factual or legal arguments to rebut the U.S. showing. For reasons of time, we will not address the factual issues now, but will respond to any questions the Panel might have. However, there are a few legal issues that warrant further discussion.

a. The Dasa and CASA transactions did not extract subsidies.

23. The first, and most critical, legal point is that the Panel and the Appellate Body disposed of this issue when they found that the Dasa and CASA transactions did not extract subsidies from Airbus. Allowing the EU to reopen this question would be contrary to Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), which calls for compliance panels to consider the existence and WTO consistency of *measures taken to comply*, and does not provide for a further appeal of the DSB recommendations and rulings.

24. The EU argues that responding parties are free to challenge any findings of the original panel or Appellate Body with which they disagree.[20] They attempt to distinguish past findings that a party to an Article 21.5 proceeding is not permitted to relitigate issues settled in the original proceeding as applying only to complaining parties. However, the terms of reference under Article 21.5 apply equally to both parties, and do not create a special exception for responding parties. The Appellate Body's findings apply similarly to both parties, and the acceptance by both parties of the adopted panel and Appellate Body reports is equally unconditional.

25. On the substance, the EU argues that the original panel did not decide this issue, but merely found that the EU had failed to prove its point.[21] However, that is not accurate – the Appellate Body ultimately upheld the "finding by the Panel, in paragraphs 7.276 and 7.288 of the Panel Report, that the 'cash extractions' from Dasa and CASA did not remove a portion of past subsidies. This is a substantive resolution of the issue, and nothing in Article 21.5 permits a party to reopen a settled issue because it wishes it had made better arguments the first time around.

26. If the Panel does decide to revisit the original panel's conclusions, it should not change them. The Appellate Body found that "a consideration of whether the cash removed from a company eliminates past subsidies is a fact-specific inquiry that must be assessed based on the

[20] EU FWS, paras. 260-266.

[21] EU SWS, para. 196, *citing* EU FWS, paras. 256-259, citing *EC – Large Civil Aircraft (AB)*, para. 746.

circumstances of the case."[22] At a minimum, the party asserting extraction of subsidies, in the view of the Appellate Body, "was required to explain how the specific subsidies . . . were reflected in the balance sheets of those companies, and how the cash removed or 'extracted' represented the remaining or unused value of these subsidies."[23]

27. The United States has shown that these transactions did not "extract" any funds from Airbus or EADS, and that there is no evidence that the monies involved in the transactions "represented" past subsidies. In fact, the only conclusion supported by the evidence is that, if the subsidies extracted anything, it was non-subsidized value.[24]

28. Rather than rebut this damning evidence, the EU argues that the Panel should ignore it, ostensibly because the evaluation of an alleged extraction "can only be based on the analysis of the objective effects that the cash extraction has on the financial position of the company."[25] The first flaw in this approach is that the Appellate Body never imposed such a restriction, and it is difficult to see why a Panel would disregard evidence that elucidated how such an alleged extinction transaction operated. The second flaw is that the EU then proceeds to ignore its own test, citing no objective evidence and asking the Panel to rely instead on a series of assumptions about how subsidies operate. As this muddled argument has no basis in law or fact, it should be rejected.

b. Transactions in EADS, Airbus, and Aérospatiale Shares Did Not Extinguish Subsidies.

29. The other mechanism that the EU relies upon to evade its withdrawal obligation is the supposed extinction of subsidies through a series of transactions involving EADS, Airbus, and Aérospatiale shares. Our submissions discuss the facts of each transaction in detail,[26] and we will not repeat that analysis here. Instead, we will focus on the critical legal flaws in the EU's approach.

30. First, as with extraction, the original panel and the Appellate Body already addressed the issues. Second, the Appellate Body could not have been more clear as to the sort of analysis needed to conclude that a change in ownership extinguished past subsidies. It is worth quoting at length:

> a fact-intensive inquiry into the circumstances surrounding the changes in ownership would be required in order to determine the extent to which there are sales at fair market value and at arm's length, accompanied by transfers of

[22] *EC – Large Civil Aircraft (AB)*, para. 744.

[23] *EC – Large Civil Aircraft (AB)*, para. 746.

[24] US SWS, paras. 206-211.

[25] EU SWS, para. 208.

[26] *EC – Large Civil Aircraft (AB)*, paras. 738-739; US SWS, para. 207.

> ownership and control, and whether a prior subsidy could be deemed to have come to an end. Moreover, a panel assessing claims under Part III of the SCM Agreement would have to examine whether the transactions are of a nature, kind, and amount so as to affect an adverse effects analysis and attenuate the link sought to be established by the complaining party under Articles 5 and 6 of the SCM Agreement between the alleged subsidies and their alleged effects.

As can be seen, the test has two elements. The first sentence imposes a generalized test that includes an independent consideration of "whether a prior subsidy could be deemed to have come to an end." The second sentence adds an additional analysis for claims under Part III of the SCM Agreement, to examine the nature, kind and amount of the transaction to evaluate its relevance to the adverse effects analysis. As this dispute involves a claim under Part III of the SCM Agreement, *both* considerations apply.

31. The EU attempts to reduce this analysis to a mechanistic consideration of the first three factors in the first sentence, but it provides no valid reason to ignore the Appellate Body's clear guidance that the analysis must go further. It notes that paragraph 733 of the Appellate Body report references only the three factors in rejecting the EU arguments.[27] However, that reference merely reflects the fact that the EU failed in the first step of the analysis, such that the consideration of other reasons why the subsidy could be deemed to have come to an end, or adverse effects been removed, in the second step was unnecessary. The EU also argues that the "fact-intensive inquiry" demanded by the Appellate Body is restricted to the three identified factors.[28] However, the Appellate Body imposed no such restriction and, again, it is difficult to see how a Panel could disregard other evidence that elucidated the nature of the transaction. Finally, the EU notes that the Appellate Body members, in their separate views, did not identify additional issues for a panel to consider, such as adverse effects. However, that is only natural, as their separate views addressed only areas of disagreement, whereas they agreed on the need to examine all of the factors laid out in the analysis quoted above.

32. The EU also errs in its argument that the analysis of control hinges on changes in the nature of control. The Appellate Body found that a panel considering whether transactions extinguished past subsidies must evaluate "to what extent they involved a transfer in ownership and control to new owners."[29] Thus, there must be movement of control from old owners to the new. The fact that minority shareholders may in some circumstances influence management or corporate decisions does not mean that control of the corporation has been transferred to them.

C. LA/MSF for the A350 XWB.

33. We now turn to the EU's latest subsidies to Airbus, more than $4 billion in LA/MSF for the A350 XWB. As we have pointed out, this financing operates just like traditional LA/MSF

[27] EU SWS, para. 225.

[28] EU SWS, para. 228.

[29] *EC – Large Civil Aircraft (AB)*, para. 733.

for earlier aircraft programs. It has the same four core terms, confers a benefit to Airbus, and has the effect of enabling aircraft launches that would otherwise not occur. These characteristics establish a close relationship with previous grants of LA/MSF that justifies including them all in the scope of this proceeding. But these common characteristics have another significant implication. In light of the better-than-commercial terms of every single financing package that the EU member States considered for the A350 XWB, the EU knew all along that it was conferring a subsidy in defiance of WTO rules. These actions conflict directly with its obligation to withdraw the subsidy or remove its adverse effects.

34. It also merits note that the EU has striven mightily to hide the facts of the funding for that aircraft. Most recently, in its second written submission, the EU revealed only one of the business cases for A350 XWB financing, long after it was requested by the Panel and with no explanation for its tardiness. Nevertheless, even this selective and belated disclosure serves to validate the U.S. demonstration of WTO inconsistency, and we will discuss it further in our HSBI statement. And that selective disclosure, without any explanation as to why the EU failed to provide the information earlier, leads to the logical inference that the withheld documents would support the U.S. claims in this dispute.

1. LA/MSF for the A350 XWB is Within the Panel's Terms of Reference.

35. As the United States explained in its written submissions, LA/MSF for the A350 XWB has a close relationship to prior grants of LA/MSF in terms of its nature, effects, and timing. Funding for that aircraft replaces and maintains prior LA/MSF that the EU had an obligation to withdraw, and would have the effect of circumventing that obligation. For each of these reasons, financing for the A350 XWB is within the Panel's terms of reference.

36. Our second written submission demonstrates that there is no support for the EU's "single over-arching measure" test for including undeclared compliance measures in a proceeding under Article 21.5. It provides additional explanation as to how LA/MSF for the A350 XWB satisfies the existing tests for inclusion in this proceeding. The EU's second written submission addresses none of this, but merely repeats the arguments from the first submission. That leaves no new arguments for us to rebut, so we will move on to the next topic.

2. LA/MSF Does Not Exist in the Market.

37. The United States has also shown that LA/MSF on the terms offered for the A350 XWB is not available in the market. The EU attempts to rebut this showing by arguing that LA/MSF involves "risk sharing," and that "risk sharing" features in other financial instruments.[30] It even argues that the U.S. use of risk-sharing concepts to generate a benchmark represents a concession that LA/MSF is available in the market.[31] Neither assertion is correct. The United States has never denied that there are market instruments that shift risk. Our point has been that there is no

[30] EU SWS, para. 287.

[31] EU SWS, para. 288.

market instrument that shifts risk in the way and on the terms that LA/MSF does. The U.S. advocacy of a benchmark does not represent a move from this view. In fact, the benchmark advocated by the United States – following an approach endorsed by the Appellate Body – uses a constructed benchmark precisely because there is no market analog for LA/MSF. Thus, the U.S. benchmark (and the panel and Appellate Body findings) support a finding that LA/MSF on the terms offered to the A350 XWB is *not available on the market*.

3. The Evidence Shows that LA/MSF for the A350 XWB is on Better-than-Market Terms.

38. Dr. Jordan demonstrated that all four instances of LA/MSF for the A350 XWB are subsidies.[32] He took a highly conservative approach in reaching this conclusion:

- To calculate the commercial benchmark, Dr. Jordan adopts the approach accepted by the original panel, the Appellate Body, and the EU in the original dispute: constructing a rate based on a country rate, a company risk premium, and a project-specific risk premium.[33]

- Dr. Jordan used the same approach for the first two elements of that compound rate as he did in the original dispute. The original panel and the EU endorsed this approach.[34]

- To calculate the project-specific risk premium, Dr. Jordan averaged two risk premiums originally proposed by Prof. Robert Whitelaw, the EU's consultant.[35]

39. In a report appended to the EU second written submission, Prof. Whitelaw presents a number of criticisms of Dr. Jordan's approach. It is significant, however, that Prof. Whitelaw never disagrees with Dr. Jordan's ultimate conclusion: that MSF for the A350 XWB conferred a benefit. In fact, even if all of Prof. Whitelaw's criticisms were valid – which is not the case – rates charged on LA/MSF for the A350 XWB are below the benchmark. We will elaborate further on this point in our HSBI statement.

40. For now, let's turn to Prof. Whitelaw's main criticisms of Dr. Jordan: first, that the benchmark should be based on information regarding EADS, rather than bond rates specific to

[32] NERA, *Comparison of A350 XWB LA/MSF Interest Rates with Market Benchmarks*, Oct. 18, 2012 (Exhibit USA-475(BCI/HSBI)) ("Jordan Report").

[33] *See* Jordan Report, paras. 12-13; *EC – Large Civil Aircraft (AB)*, para. 874.

[34] *See EC – Aircraft (AB)*, para. 874.

[35] Jordan Report, para. 21; Robert Whitelaw, *Rebuttal Report*, May 24, 2012 (Exhibit EU-123(BCI/HSBI)), paras. 31, 41-44.

Airbus and host countries; and, second, that Dr. Jordan's project risk premium, based on Professor Whitelaw's own work, is too high.[36] These criticisms are not valid.

41. On the first issue, the United States notes that the approach taken by Dr. Jordan is consistent with that applied during the original proceeding, including by the original panel and the Appellate Body itself.[37] It also captures the differences in country-specific borrowing rates that Professor Whitelaw's approach would overlook. By contrast, Professor Whitelaw's proposed corporate borrowing rate suffers from several defects, which we will discuss in the HSBI oral statement.

42. On the second issue, the risk premium, Dr. Jordan based his figures on Prof. Whitelaw's own work,[38] even if Prof. Whitelaw now seems to disavow that work. Much of the relevant evidence is BCI or HSBI, but I would refer the Panel to paragraphs 31 and 41-44 of the EU's Exhibit 123, where Professor Whitelaw advanced the relevant calculations for the first time in May 2007. Exhibits 1-5 to EU-123 contain detailed information on these calculations.

43. Dr. Jordan's risk premium has an added advantage over the alternative risk premium now proposed by Professor Whitelaw: it was not already rejected by the original panel and the Appellate Body. The original Panel found that Professor Whitelaw's risk premium "understates the risk premium that a market operator would have reasonably demanded Airbus pay for financing on the same or similar terms as LA/MSF for this particular model of LCA{}",[39] and the Appellate Body agreed. In the Appellate Body's view, "the rate of return of the risk-sharing suppliers is distorted by the LA/MSF received by Airbus, {so} it cannot be used to derive a benchmark that reflects the terms of a comparable commercial loan that Airbus could have actually obtained on the market."[40] In light of these DSB-adopted findings, Professor Whitelaw's original risk premium is no longer a viable option in this proceeding.

II. THE EU HAS GRANTED PROHIBITED SUBSIDIES TO AIRBUS.

44. I would like to address the U.S. demonstration that LA/MSF for the A380 and A350 XWB are prohibited export subsidies under Article 3.1(a) of the SCM Agreement. I will then address the U.S. demonstration that LA/MSF for the A350 XWB is also a prohibited import-substitution subsidy under Article 3.1(b) of the SCM Agreement.

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[36] *See Response to Dr. Jordan's Report on the Benefits of MSF*, Dec. 13, 2012 (Exhibit EU-121(BCI/HSBI)) ("Whitelaw Response").

[37] *See EC – Large Civil Aircraft (AB)*, para. 874.

[38] *Contrast* Whitelaw Response, heading prior to para. 14 ("Dr. Jordan's Risk Premium for A350XWB MSF is Not Based on My Work.").

[39] *EC – Large Civil Aircraft (Panel)*, paras. 7.481.

[40] *EC – Large Civil Aircraft (AB)*, para. 921.

A. Prohibited Export Subsidies Under Article 3.1(a) of the SCM Agreement

45. The original panel found, and the Appellate Body affirmed, that at the time the LA/MSF contracts for the A380 were concluded, the EU member States anticipated exportation or export earnings for purposes of Article 3.1(a) of the SCM Agreement. The only remaining question is whether the ***granting*** of the subsidy is ***tied*** to the anticipated exportation or export earnings. The evidence demonstrates that the granting of the A380 LA/MSF, as well as the A350 LA/MSF, was in fact tied to Airbus's anticipated exportation or export earnings.

46. The findings adopted by the DSB make abundantly clear that, in the absence of LA/MSF, Airbus likely would not exist. This isn't a case of subsidies being granted to an enterprise that happens to export; this is the creation through LA/MSF of an Airbus that was designed and structured to be an export powerhouse. LA/MSF for the A380 was just the next step on the EU's quest to build a global champion. The EU did not provide subsidized funding in excess of $4 billion while ignorant or indifferent to the export potential of Airbus's latest product; they came through with massive subsidies again ***because*** of the potential for massive exports. The Spanish and German A380 LA/MSF contracts, UK press statements, statements by the former French Prime Minister and President, and extensive other evidence put forward by the United States support this conclusion clearly. With A380 LA/MSF, the EU was changing the calculus to make possible what otherwise would not have been – an ambitious project, the success of which depended overwhelmingly on anticipated export performance and export earnings. The EU member States again structured the subsidies in a way that made clear that the granting of the subsidies was due to – or contingent upon – the anticipated export performance or export earnings.

47. In this dispute, the Appellate Body found that the determination of *de facto* export contingency can be supported by a comparison between, on one hand, the ratio of anticipated export and domestic sales resulting from the granting of the subsidy, and, on the other hand, the situation in the absence of the subsidy. For LA/MSF for the A380, this was the sole aspect of the analysis the Appellate Body found was missing from the original panel findings and the undisputed evidence. The United States has picked up on the Appellate Body's guidance and demonstrated that the anticipated ratio is significantly higher than the baseline ratio, confirming that Airbus's anticipated exports with A380 LA/MSF were skewed toward exports.

48. Thus, there is no doubt that that the granting of the A380 subsidies was tied to anticipated export performance or export earnings. Under Article 3.1(a) of the SCM Agreement, this is exactly the type of *de facto* export subsidy that is prohibited.

49. The United States also has produced equally compelling evidence that LA/MSF for the A350 XWB likewise constitutes prohibited export subsidies under Article 3.1(a) of the SCM Agreement. Just as with the A380, the EU member States provided massive subsidies to support the A350 XWB, again enabling Airbus to continue its subsidized success in markets all over the globe. And as with the A380, a comparison of the anticipated and baseline ratios as advised by the Appellate Body reinforces how such subsidies skew future export performance. As the

United States has shown, the anticipated export ratio in contemplation of receiving the subsidy is significantly higher than the baseline ratio in the absence of the subsidy. Thus, the granting of the A350 XWB subsidies was tied to anticipated export performance or export earnings and, therefore, runs afoul of Article 3.1(a) of the SCM Agreement.

B. Prohibited Import-Substitution Subsidies Under Article 3.1(b) of the SCM Agreement

50. LA/MSF for the A350 XWB is also prohibited under Article 3.1(b) of the SCM Agreement. Article 3.1(b) prohibits subsidies contingent upon the use of domestic over imported goods. This is precisely what EU member States demanded of Airbus. As a condition of receiving LA/MSF, Airbus, in producing the A350 XWB, is contractually required to use a variety of domestic, and not imported, goods.

51. This is because, in return for the subsidies provided by the EU, Airbus agreed to use goods produced in the EU. Airbus touts its non-discriminatory procurement policy, which it contends directs executives and employees to select suppliers based on the commercial objectives of the firm. Yet, there are certain components that Airbus could not source outside the EU no matter how cheaply they were made available because doing so would be inconsistent with Airbus's obligations undertaken in return for LA/MSF. And therein lies the problem. Airbus cannot always choose to use components that best serve Airbus's commercial objectives because, in some instances, Airbus is contractually required, in return for the granting of LA/MSF, to use domestic goods.

52. In addition, Airbus agreed to certain employment requirements. As a practical matter, fulfilling those requirements requires that goods be produced in the EU; otherwise, the guaranteed employment levels would not be reached. Thus, the EU member States effectively guaranteed that EU-produced components would be used in A350 XWB aircraft by conditioning the granting of the subsidies on these employment guarantees.

53. The EU's introduction of Article III of the GATT 1994 is a red herring. Article III:8(b) of the GATT 1994 merely states that provisions elsewhere in the Article shall not prevent the payment of subsidies exclusively to domestic producers. Putting aside that the SCM Agreement could prohibit something that would not be prohibited under Article III of the GATT 1994, the United States is not making any argument that the EU provided subsidies to domestic producers only and not foreign producers, which would potentially implicate Article III:8(b) of the GATT 1994.

54. Rather, the issue here is that the subsidy to Airbus was contingent on the ***use*** of domestic over imported goods. In fact, even if the EU had provided subsidies to foreign producers based on their use of domestic – that is, EU – goods, it would still run afoul of Article 3.1(b) of the SCM Agreement. These types of supply localization requirements are precisely the kinds of measures that Article 3.1(b) was intended to address.

55. Finally, the EU cannot condition a subsidy on the use of domestic goods just because those domestic goods are produced by the same producer as the subsidized product. There is no vertical integration exception to Article 3.1(b). Thus, it is not relevant whether Airbus, for example, produces the wings or purchases the wings from a supplier. What is relevant is that Airbus is required, as a condition of receiving the subsidy, to use EU wings in producing the A350 XWB. The evidence demonstrates that, in return for the subsidies provided through LA/MSF to the A350 XWB, Airbus was left with no choice but to use certain EU components.

56. The evidence thus demonstrates clearly that the EU made the granting of LA/MSF for the A350 XWB contingent upon the use of domestic over imported goods. This is the epitome of what Article 3.1(b) prohibits, and the United States therefore respectfully requests the Panel to find as much in this compliance proceeding.

III. THE EUROPEAN UNION HAS FAILED TO REMOVE THE ADVERSE EFFECTS AND CAUSED ADDITIONAL ADVERSE EFFECTS BY PROVIDING NEW SUBSIDIES TO THE A350 XWB.

57. The original Panel found, and the Appellate Body affirmed, that given the tremendous costs and risks associated with the development of large civil aircraft, Airbus would not have launched any of its large civil aircraft absent LA/MSF.[41] Because Airbus did receive LA/MSF, the U.S. LCA industry experienced adverse effects on a massive scale:

- The significant lost sales findings cover more than 400 aircraft orders worth many billions of dollars. This includes single-aisle campaigns where Airbus captured key Boeing accounts like easyJet and AirAsia. It also includes A380 launch orders at Singapore Airlines, Qantas and, most importantly, Emirates – by far the largest customer for very large aircraft in the past 15 years; and

- The displacement findings cover seven major country markets, including the single- and twin-aisle markets in the EU and China.

58. The situation is no better today. Rather than withdraw the subsidies or remove their adverse effects, the EU has carried on as if it is business as usual with LA/MSF. The latest iteration: billions of euros in LA/MSF provided to Airbus for the A350 XWB, resulting in 296 orders, and tens of billions of dollars in sales, taken from U.S. twin-aisle LCA.[42] As a result, the United States continues to suffer serious prejudice, and the United States continues to be deprived of an appropriate remedy under Article 7.8 of the SCM Agreement.

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[41] *EC – Large Civil Aircraft (Panel)*, paras. 7.1934 (A300), 7.1936 (A310), 7.1938 (A320), 7.1939 (A330/A340), 7.1940 (A330-200), 7.1941-7.1942 (A340-500/600), 7.1948 (A380); *EC – Large Civil Aircraft (AB)*, paras. 1273 (A300, A310, A340, A340-500/600), 1275 (A320, A330), 1356 (A380).

[42] *See* US FWS, Summary of U.S. Lost Sales Claims Demonstrating EU Failure to Take Appropriate Steps to Remove Adverse Effects (Exhibit USA-164).

59. These findings and others obligated the EU to withdraw the subsidies found or remove their adverse effects. Yet the EU and the relevant member States have done nothing to withdraw LA/MSF subsidies to Airbus and they have done nothing to remove the subsidies' adverse effects. In short, they have done nothing to act upon the DSB's recommendations and rulings.

60. The results of the EU's LA/MSF as usual are detailed in the U.S. written submissions. The United States has already underscored today that the EU failed to withdraw the subsidies. We will now discuss the EU's failure to remove the adverse effects. Our first point is that the original Panel and the Appellate Body found that LA/MSF and other subsidies cause adverse effects. In this context, we will discuss how the EU's reliance on the passage of time rather than appropriate compliance steps has done nothing to address, let alone remove, the adverse effects caused by LA/MSF. We will then discuss the U.S. demonstration of continued, present adverse effects, and the failure of the EU's arguments to undermine the causal relationships between the subsidies and Airbus's current product line. Finally, we will close by discussing the indicia of continued, present adverse effects; that is, the product markets and the displacement, impedance, and significant lost sales occurring in the markets.

A. Failure to Remove Adverse Effects

61. The original Panel found, and the Appellate Body affirmed, that Airbus received a steady stream of LA/MSF for nearly 40 years, causing massive distortions in the market. LA/MSF enabled Airbus to develop and bring to market its product line at a pace and in a way that it could not have done otherwise. LA/MSF did so in two ways.

62. First, the original Panel and the Appellate Body found that LA/MSF had effects on the model that received the aid directly – what we label in the U.S. submission for identification purposes as the "primary" effects. The primary effects of LA/MSF to a given Airbus model caused each model to be launched as and when it did, thereby injecting supply into the market that would not exist otherwise.

63. Then there are the cascading effects of LA/MSF on subsequent LCA programs – what we labeled for identification purposes as the "secondary" effects. These secondary effects are:

(1) the technology, know-how and production processes Airbus needed to launch every new LCA program;

(2) the economies of scope and scale Airbus needed for the launch of each new LCA program;

(3) Airbus's capital structure, *i.e.*, the major reason why Airbus did not suffer the capital burdens it should have if it had to rely on market-based financing for its prior LCA programs; and

(4) Airbus's revenue stream, *i.e.*, the major reason why Airbus had cash available to help fund the new launch and sustain it during program delays, like those involving the A380.[43]

64. LA/MSF's primary and secondary effects shaped all major material aspects of Airbus's participation in the LCA industry to the detriment of the U.S. LCA industry. Indeed, the original Panel found, and the Appellate Body confirmed, that without LA/MSF, Airbus would be at most a far weaker LCA manufacturer,[44] and likely would not exist at all.[45]

65. After the DSB adopted these findings, the EU was obligated to comply pursuant to Article 7.8 of the SCM Agreement. The EU chose not to do so, preferring inaction. Now the EU asks this Panel to believe that the underlying findings are subject to reconsideration and that the passage of time can substitute for affirmative compliance steps. The EU is mistaken.

66. The original dispute and this compliance proceeding are parts of a continuum.[46] Contrary to the EU's position, the relevant question here is not whether the United States can demonstrate that LA/MSF and other subsidies cause present adverse effects. That was the question for the original proceeding. The relevant question here is the one posed by DSU Article 21.5 and SCM Agreement Article 7.8 – whether the EU has withdrawn the subsidy or taken appropriate steps to remove the adverse effects. It clearly has not.

67. Nonetheless, the EU insists that it was not required to take affirmative compliance steps because some of the subsidies have been withdrawn through their expiration over time. As we explained earlier, examining the life of subsidies and their effects is not a withdrawal issue, but one of many factors to be considered in an adverse effects analysis. And in that context, as the Appellate Body made clear, the effects of subsidies may well outlive the expiration of the subsidies themselves.[47]

68. In the adverse effects portion of a compliance proceeding such as this, an assessment of the life of the subsidies and their effects must start with the underlying findings. Before the original Panel, the EU argued that most of the LA/MSF subsidies, and their effects, had expired before the end of the original 2001-2006 reference period.[48] It also argued that much of the other LA/MSF, along with capital contributions and other older subsidies, had either "expired" or been withdrawn through what the EU called "extraction." On all of these points, the original Panel

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[43] US SWS, para. 402 note 646.

[44] *EC – Large Civil Aircraft (AB)*, paras. 1269-1270.; *EC – Large Civil Aircraft (Panel)*, para. 7.1993.

[45] *EC – Large Civil Aircraft (AB)*, para. 1264.; *EC – Large Civil Aircraft (Panel)*, para. 7.1984.

[46] *Chile – Price Band System (21.5) (AB)*, para. 136.

[47] *EC – Large Civil Aircraft (AB)*, para. 712.

[48] *EC – Large Civil Aircraft*, EC First Written Submission, Expert Statement – ITR Subsidy Allocation, paras. 4-5, Table 4 (Exhibit EC-13) (BCI). *See also EC – Large Civil Aircraft*, EC First Written Submission, paras. 1648-1649.

disagreed and found that LA/MSF and the other subsidies not only continued to exist but were "extremely large."[49] The original Panel also found that they cause present adverse effects.[50] The EU did not appeal the original Panel's findings regarding the present magnitude of LA/MSF subsidies, and the Appellate Body affirmed the existence of present adverse effects.[51]

69. Now before the compliance Panel, the EU once again contends that the bulk of the allegedly expired subsidies came to an end before 2006. This cannot be true given the original Panel's unappealed findings. And the EU is unable to cite any post-2006 events that would cause the effects of LA/MSF subsidies that were large and trade-distorting in 2006 to disappear within the last seven years. This leaves the EU with no basis for arguing to the compliance Panel that it did not need to do anything.

70. This is not to say that LA/MSF's adverse effects will last forever. Both the primary and secondary effects from a given grant of LA/MSF will tend to diminish over time, but it will tend to be a *long* time. This is by design. The EU member States gave LA/MSF subsidies to stimulate supply in an industry where anticipated product life cycles are long but the precise life of a given program is uncertain.

71. The EU member States also gave LA/MSF subsidies for program after program after program, allowing secondary effects of LA/MSF to earlier models to contribute to later models. Thus while the effects of LA/MSF to a terminated LCA program like the A300 may have diminished to the extent that it cannot cause adverse effects by itself, such LA/MSF may still be considered in assessing the impact of more recent LA/MSF. One obvious way to hasten the end of this phenomenon is for the EU members to stop giving LA/MSF to Airbus, but they keep choosing LA/MSF as usual, most recently with the A350 XWB.

72. In sum, the EU's arguments about the passage of time cannot succeed now when they failed before. The United States has confirmed this by demonstrating that the adverse effects have continued from the original reference period through the present. Today, each model in Airbus's current product line is a recipient of LA/MSF, each would be absent from the market without LA/MSF, and each is taking sales and market share from the U.S. LCA industry. With the EU taking no appropriate compliance steps, and with the EU making no meaningful change in the market situation besides the provision of yet more LA/MSF to the A350 XWB, there is not a shred of evidence to suggest that the adverse effects found in the underlying proceeding no longer exist.

[49] *EC – Large Civil Aircraft (Panel)*, para. 7.1967.

[50] *EC – Large Civil Aircraft (Panel)*, para. 8.2.

[51] *EC – Large Civil Aircraft (AB)*, paras. 1414(l), (m), (p), (q), and (r).

B. Continued Product Effects

73. The other EU arguments regarding causation are similarly incapable of undermining the U.S. demonstration, or the basis of the original Panel and Appellate Body findings adopted by the DSB.

1. A320 and A330

74. For example, with respect to the A320 and A330, the EU tried to show before the Appellate Body that, absent LA/MSF, Airbus could have altered its product development behavior so as to market the A320 and A330 during the original reference period. The Appellate Body rejected the EU's efforts.[52] Here, before the compliance Panel, the EU does not even try to show that Airbus could now offer customers the A320 and A330 absent LA/MSF. Instead, while admitting that LA/MSF to those models remains a genuine cause of their current market presence, the EU contends that LA/MSF is no longer a substantial cause because Airbus's post-launch model changes are supposedly more important.[53]

75. The United States' second submission refutes the EU arguments in detail, so we will reiterate here just two points:

- First, LA/MSF was found to be essential to the very existence of the A320 and A330.[54] It thus should go without saying that LA/MSF has been essential to Airbus's ability to pursue any improvements to A320 and A330. Consequently, LA/MSF substantially accounts for Airbus's ability to sell these models, improved or otherwise, today.

- Second, a large portion of the cited improvements were made before or during the original 2001-2006 reference period, when a genuine and substantial causal relationship indisputably existed between LA/MSF and the A320 and A330.[55] There is no credible basis then for asserting that the substantial role of LA/MSF in the commercial fortunes of these aircraft became abruptly insubstantial several years later.

2. A380

76. With respect to the A380, the original Panel found, and the Appellate Body upheld, that "either directly or indirectly, LA/MSF was a necessary precondition for Airbus' launch in 2000 of the A380."[56] Nothing has changed since the original Panel's finding: The EU has not

[52] *EC – Large Civil Aircraft (AB)*, para. 1275.

[53] See EU SWS, paras 736-738.

[54] *EC – Large Civil Aircraft (AB)*, para. 1275; *EC – Large Civil Aircraft (Panel)*, paras. 7.1938-7.1940.

[55] *See* US SWS, para. 517.

[56] *EC – Large Civil Aircraft (Panel)*, para. 7.1948; *see EC – Large Civil Aircraft (AB)*, paras. 1356.

withdrawn the LA/MSF that, indirectly and directly, was a necessary precondition for the launch of the A380.

77. The United States and its expert, Professor David Wessels of the University of Pennsylvania's Wharton School of Business, confirmed that the A380's current market presence remains dependent on LA/MSF.[57] Professor Wessels built on the original Panel's findings concerning the "massive" debt that Airbus would have incurred if it had managed what the original Panel called the "impossible" feat of financing its pre-A380 product launches on market terms.[58] Proceeding from the well-established proposition that a company with too much debt must pay down its debt to sustainable levels before starting a new project, Professor Wessels showed that Airbus would have been unable to launch the A380 until 2019 at the earliest.[59] His analysis illustrates a core aspect of the original Panel's causation findings: that LA/MSF allows Airbus to launch and bring to market LCA at a pace that would otherwise be impossible.[60] It also confirms that the effects of LA/MSF are very much with us in the present.

78. The EU cannot, and does not, say much about this conclusion besides repeating its argument that it has withdrawn the subsidies.[61] The EU does accuse Professor Wessels of assuming his own conclusions about the size of Airbus's counterfactual debt burden, but the only conclusion he presumed was that of the original Panel, which said Airbus's burden would have been so "massive" as to prevent Airbus from launching the A380 as and when it did.[62]

79. Because Airbus used LA/MSF to launch as and when it did, the A380 is currently in the very large aircraft market taking sales from Boeing's 747. The EU would, however, like this Panel to believe that the two models do not compete. This is an old argument that the original Panel and Appellate Body considered and rejected,[63] finding that Boeing's 747 lost sales to the A380 at Emirates, Qantas, and Singapore Airlines.[64]

80. The EU cannot provide any legitimate reason why the situation should be any different now. Even Airbus, as the slide accompanying this statement shows, considers the EU's argument fictitious. In its own words, Airbus believes that "{t}he A380 is the market's VLA of choice"[65] compared to the 747 right now, today, and that "{t}he A380 will dominate this

[57] US SWS, paras. 543-546; Professor David Wessels, Assessing Airbus Capacity to Fund Large Scale Projects Without LA/MSF (Oct. 17, 2012) (Exhibit USA-364) ("Wessels Report").

[58] Wessels Report, 3 (Exhibit USA-364); *EC – Large Civil Aircraft (Panel)*, para. 7.1984.

[59] Wessels Report, 6 (Exhibit USA-364).

[60] *See EC – Large Civil Aircraft (Panel)*, para. 7.1972.

[61] EU SWS, para. 865.

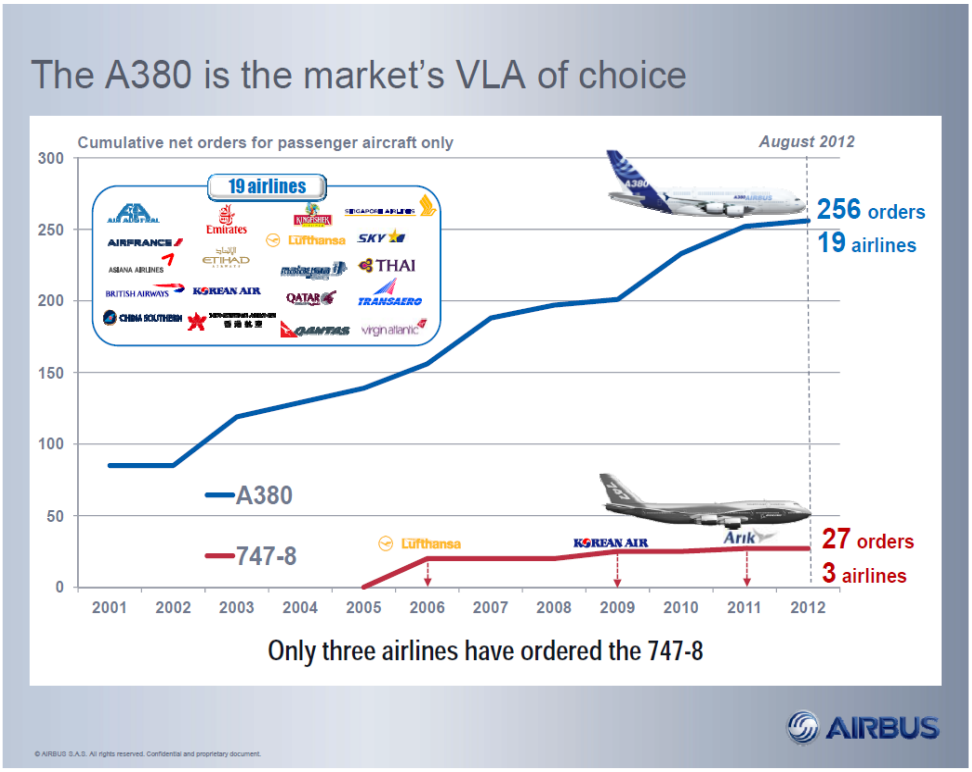
[62] *EC – Large Civil Aircraft (Panel)*, para. 7.1948.

[63] *EC – Large Civil Aircraft (AB)*, paras. 1227-1228, 1414(o); *EC – Large Civil Aircraft (Panel)*, para. 7.1832.

[64] *EC – Large Civil Aircraft (AB)*, para. 1414(p); *EC – Large Civil Aircraft (Panel)*, paras. 7.1832, 8.2(d).

[65] *A380 Product Update*, Presentation, EADS (Oct. 3, 2012), slide 13 (Exhibit USA-492).

market"[66] for the foreseeable future. Airbus thus gives this Panel a prime reason for rejecting the EU's assertion that LA/MSF no longer is a genuine and substantial cause of adverse effects.



3. A350 XWB

81. Finally, LA/MSF was a necessary precondition for the A350 XWB's launch and subsequent market presence. The United States will discuss in detail the causal effects of LA/MSF to the A350 XWB in its confidential statement, so for right now we will review briefly four key aspects of the U.S. demonstration.

82. *First*, the A350 XWB program has been tremendously costly and risky. Its estimated development costs started at €10 billion[67] and would soon climb higher.[68] The European Commission itself found in an EU State Aid decision that "{t}he risks assumed by Airbus, taken together, have difficulties which are *a priori* likely to have an impact on the A350 XWB

[66] *A380 Product Update*, Presentation, EADS (Oct. 3, 2012), slide 75 (Exhibit USA-492).

[67] Peggy Hollinger, *Deal struck on Airbus A350 funding*, Financial Times (Nov. 30, 2006) (Exhibit USA-334) (emphasis added).

[68] US FWS, para. 368.

program."[69] It also found that "because of the important risks, manufacturers specializing in aerostructures are globally suffering a general lack of financing, which the current economic and financial crisis is still accentuating."[70] This conclusion agrees with the original Panel's findings that LCA programs are "enormously complex and expensive" and beset by considerable uncertainty that makes "it very difficult to finance the huge development cost on capital markets."[71]

83. *Second*, EU support for the A350 XWB has been ever-present, from the period prior to the program's launch, through the finalization of the LA/MSF contracts, to the ongoing funding of its development costs. After receiving LA/MSF for each of its models, and after receiving assurances that it would receive LA/MSF for the Original A350,[72] Airbus launched the A350 XWB only after receiving French, German, Spanish, and UK "guarantees" covering €4 billion of the program's projected development costs.[73] This figure is in line with the one-third share of development costs financed by LA/MSF for the A380 and other programs.[74] EU support then culminated in the ongoing provision of LA/MSF to the A350 XWB.

84. *Third*, it is undisputed that LA/MSF to the A350 XWB has the same below-market, levy-based, unsecured, success-dependent, and backloaded nature as prior LA/MSF. These are the same core terms that, according to the original Panel's unappealed findings, make Airbus more likely to launch its LCA programs.

85. *Fourth*, the A350 XWB program could not go forward as planned without LA/MSF. On this decisive point, the evidence is undisputable, as we will confirm in the confidential session. Here it is enough to note that the United Kingdom provided LA/MSF to the program consistent with its policy that LA/MSF should be provided where "no viable commercial financing is available"[75] and because LA/MSF was "essential for the project to proceed on the scale and in the timeframe specified."[76]

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[69] European Commission, State aid N 414/2010 – Belgium – Aid to SABCA 'Flap Support Structures' project, para. 52 (Oct. 5, 2011) (Exhibit USA-441).

[70] European Commission, State aid N 414/2010 – Belgium – Aid to SABCA 'Flap Support Structures' project, para. 55 (Oct. 5, 2011) (Exhibit USA-441).

[71] *EC – Large Civil Aircraft (Panel)*, para. 7.1717.

[72] *EC – Large Civil Aircraft (Panel)*, para. 7.307.

[73] Peggy Hollinger, *Deal struck on Airbus A350 funding*, Financial Times (Nov. 30, 2006) (Exhibit USA-334).

[74] US FWS, para. 368.

[75] United Kingdom House of Commons Business, Innovation and Skills Committee, *Full Speed Ahead*, p. 11 (Mar. 22, 2010) (Exhibit USA-44).

[76] United Kingdom House of Commons Business, Innovation and Skills Committee, *Full Speed Ahead*, p. 10 (Mar. 22, 2010) (Exhibit USA-44).

86. The EU has failed to rebut the points made by the United States. It suggests a "but for" counterfactual in which Airbus supposedly could have replaced LA/MSF with funding from other sources, but this is unsupported by the evidence and largely repeats its counterfactual A380 arguments that failed in the underlying proceeding:

- For example, the EU theorizes that EADS would have diverted funds from other uses[77] but provides no reason why this speculation should be any more persuasive than the same argument concerning the A380 rejected by the original Panel and Appellate Body.[78]

- The EU also theorizes that, putting the global financial crisis aside, Airbus would have succeeded in getting risk-sharing suppliers to nearly double their contributions to the A350 XWB development program given Boeing's use of risk sharing suppliers on the 787.[79] This is another old argument that is as unsupported by relevant evidence just like the argument rejected by the original Panel and the Appellate Body in the context of the A380.[80] Even the European Commission has implicitly rejected this argument; it found that many of the A350 XWB risk-sharing suppliers needed EU member State aid just to participate *at their actual levels*.[81] The notion that Airbus's risk sharing suppliers could have and would have lined up to take on even more risk by substantially increasing their share of A350 XWB development costs is as fanciful as it is unsupported.

87. Then there are the effects of prior LA/MSF, without which Airbus would not have had the financial, industrial, and technological attributes that it had when it launched the A350 XWB. In terms of financial effects, the EU never even attempts to demonstrate that Airbus could have launched the A350 XWB in the absence of some or all of the pre-A380 LA/MSF.[82] Because the EU has failed to withdraw any – let alone all – of the pre-A380 LA/MSF, the A350 XWB causation inquiry can be disposed of on this basis alone. This is confirmed by the aforementioned analysis of Professor Wessels, who demonstrated that, even under a set of assumptions extremely favorable to the EU, Airbus could not have undertaken the A350 XWB program until 2019 at the earliest.[83]

88. Finally, as for the technology effects of prior LA/MSF, the EU cannot explain away Airbus statements concerning the A350 XWB's incorporation of the experience and technology

[77] EU FWS, para. 1338.

[78] US SWS, paras. 626-632.

[79] US SWS, paras. 634, 643; *EC – Large Civil Aircraft (AB)*, para. 1349.

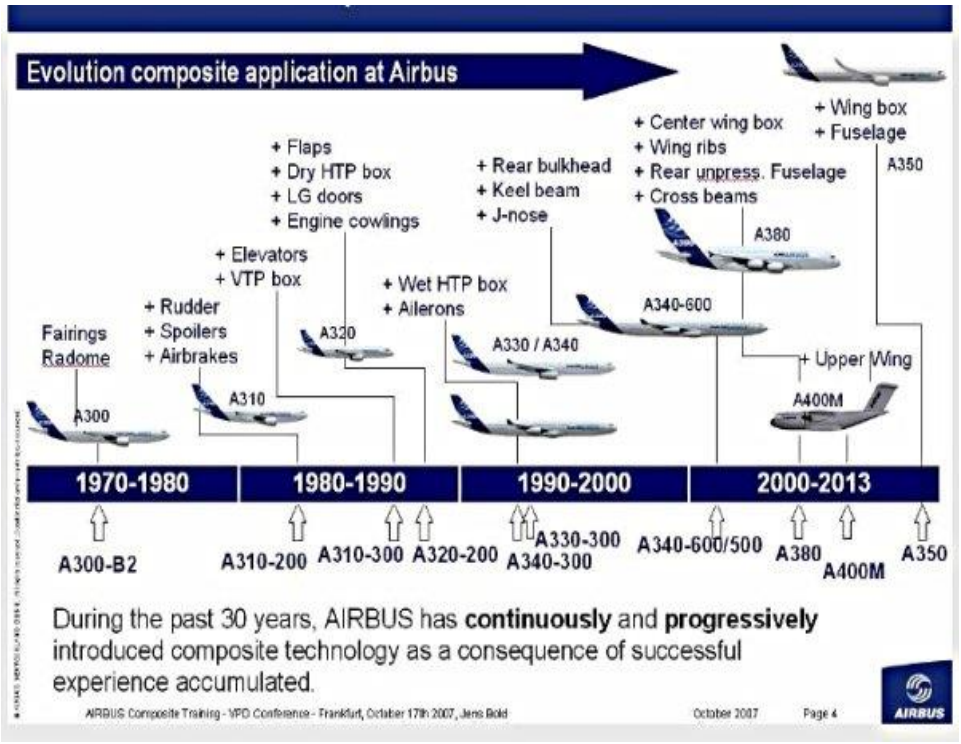
[80] EU FWS, para. 1142.

[81] US SWS, paras. 637-642.

[82] US SWS, paras. 552-554.

[83] US SWS, paras. 618-621.

Airbus developed on earlier programs. For instance, when Airbus says that the A350 XWB's cockpit and systems are based on those of the A380, the company should be taken at its word that there is a technology spillover.[84] The evidence also shows that the EU is incorrect about the novelty of the A350 XWB's composite fuselage. Airbus engineers concede that "prior commercial aircraft experience is important."[85] And as the next slide shows, Airbus depicts the composite fuselage of the A350 XWB as an outgrowth of the evolution in its composite applications. In other words, rather than characterize the use of composites in the A350 XWB as a radical break with the past, Airbus fully recognizes that "{o}ver the past 30 years, Airbus has *continuously* and *progressively* introduced composite technology as a consequence of successful experience accumulated."[86]



89. In sum, the pattern of subsidization and adverse effects is being repeated with the A350 XWB. Airbus has received LA/MSF for all of its LCA programs. Every instance of LA/MSF examined by the WTO has been found to affect Airbus's product development behavior in a way that seriously prejudices the United States. Now Airbus is receiving LA/MSF for the A350

[84] *See* US SWS, paras. 560-561.

[85] Statement by Gordon McConnell, Michael Lacabanne, Chantal Fualdes, Francois Cerbelaud and Burkhard Domke (Exhibit EU-128)(BCI).

[86] *Airbus Composite Training – VPD Conference*, Presentation, Airbus (Oct. 17, 2007), page 4 (Exhibit USA-493). *See also* US SWS, paras. 569-574.

XWB, and this LA/MSF is a subsidy – another unsecured, success-dependent, levy-based, back-loaded, better than market terms subsidy. LA/MSF to the A350 XWB is not the exception to the unbroken pattern of trade-distorting support for Airbus LCA. It is business as usual with LA/MSF as usual, and it is the complete opposite of compliance.

C. Adverse Effects Persist After December 1, 2011

90. Our final point is that, in addition to showing the EU's failure to take appropriate compliance steps, the United States has demonstrated that adverse effects from LA/MSF and other subsidies do, in fact, persist through the present. We will now highlight our arguments concerning the products and markets at issue, as well as the displacement and impedance, and significant lost sales that the United States continues to experience.

1. Product Markets

91. The Appellate Body found that WTO-inconsistent subsidies to the EU resulted in the displacement of Boeing like products based on three product markets: single aisle, twin aisle, and very large aircraft. The United States has demonstrated that the continued adverse effects in the form of significant lost sales and in the form of displacement, impedance, and threat thereof, of its products, based on the product markets on which the DSB's recommendations and rulings are based.

92. The EU asks the Panel to ignore the displacement and impedance of Boeing products based on the EU's view that there are now seven distinct product markets, only three of which contain competition between Boeing and Airbus, leaving the majority of markets – four – as monopoly markets, and one non-market. It should be self-evident that this assertion does not accurately represent the vigorous competition between these two companies. Just as important, the EU's position is irreconcilable with the findings of the Appellate Body.

93. For example, the Appellate Body found that there was displacement in the twin-aisle market in the EU, China, and Korea based on market share data consisting of deliveries of the A330/340 family on the Airbus side, and the 767 and 777 families on the Boeing side. Yet, according to the EU, the A330 and 777 families each now exists in a monopoly market, and the 767 is supposedly in no market at all. The EU does not – and cannot possibly – explain how, in a few short years, the fierce competition in the twin-aisle market that served as the basis for certain displacement findings of the Appellate Body has given way to a total absence of any competition that, necessarily, would be spinning off monopoly profits to both companies.

94. The invalidity of the EU's theory only grows upon examination of the strained reasoning to support its theory. The EU claims that the 767 – which, again, was in the twin-aisle market in the Appellate Body's displacement analysis – is no longer in a market of any kind because it is an outdated aircraft with diminished sales. That's it. That's the reason. Sluggish sales – which, by the way, the EU underestimates – precipitated by advances in the A330 renders the former marketless. But, of course, the displacement of the 767 by the A330 is the very harm that the SCM Agreement (and the DSB's recommendations and rulings) addresses; it's why we care so

much about subsidies to the A330, not – as the EU suggests – a reason to ignore subsidies to the A330.

95. In fact, under the EU's theory, the most egregious subsidy imaginable – one that kills the competitiveness of the like product – immunizes the subsidized product from review as an actionable subsidy under the SCM Agreement.

96. The EU's efforts to abandon the Appellate Body's framework for analyzing displacement and impedance cannot stand. The EU has given no valid reason to depart from the Appellate Body's framework, and therefore the U.S. displacement and impedance claims based on this same framework of the product markets: single-aisle, twin-aisle, and very large aircraft are valid.

97. The EU's flawed product market assertions make up its main effort to rebut the United States demonstration that the United States continues to suffer adverse effects in the form of displacement and impedance, including the threat thereof, in EU markets and 11 third-country markets. The EU's other arguments fail as well.

2. The EU's Previously Rejected Non-Subsidized Like Product "Rule"

98. The EU's non-subsidized like product rule argument serves as yet another example of the EU's strategy of fighting the DSB's recommendations and rulings instead of complying with them.

99. The Panel recalled in its communication of September 4, 2012, "that in the original dispute,…the Panel rejected the arguments of the European Communities that subsidization of Boeing LCA precluded a finding of serious prejudice in the form of displacement or impedance of exports. That decision was not appealed, and was therefore adopted by the DSB."

100. Nevertheless, the EU forges ahead with the same argument in this compliance proceeding. This approach cannot be reconciled with the understanding that adopted findings serve as a definitive resolution of a matter in dispute between the parties. Having failed to appeal this finding, the EU cannot reassert the same argument and contest the original panel's finding now.

101. The EU's alternative strategy is to distort what the original panel found. The EU argues that the original panel's reasoning rested in substantial part on the difficulty that a panel would have in determining that a like product is not subsidized, a difficulty the EU suggests has been made easier by findings in another dispute. Of course, the original panel did not reject the EU's non-subsidized like product argument because it thought it would be too difficult to evaluate subsidization of U.S. like products. Rather, the Panel found that the EU's position had "no basis in the text" of the SCM Agreement.

102. And this is reflective of the most significant problem with the EU's approach to this proceeding. Instead of taking steps to achieve actual compliance, the EU has chosen to ignore the original proceeding or distort the findings adopted in the original proceeding. The EU did

not remove the billions of dollars of subsidies found to be WTO-inconsistent. The EU did not even refrain from granting additional WTO-inconsistent subsidies. The EU instead hoped to attack the original panel's finding that massive EU subsidies would not be ignored if the EU could show subsidization of U.S. like products, however small by comparison. The EU should not be allowed to reopen a settled issue, nor should it be permitted to divert the Panel's attention from its unceasing WTO-inconsistent subsidization of Airbus.

3. Displacement, Impedance, and Threat Thereof

103. The EU also errs in its insistence that displacement and impedance can only be demonstrated with evidence of specific lost sales.[87] Its attempt to restrict the compliance Panel's focus to market data post-dating the compliance period is unsupported by any WTO jurisprudence, and is contradicted by the approach taken by the *Upland Cotton* compliance panel.[88]

104. On the market data, the trends clearly show the U.S. industry's position in the cited markets to be worse than it would be absent the presence of Airbus LCA dependent on subsidies.[89] This includes the very large aircraft country markets, where despite the relatively low number of deliveries, there is no mistaking the trend: the A380 has displaced, impeded, and to paraphrase Airbus, "dominated" the 747.[90]

4. Significant Lost Sales

105. Lastly, the United States has provided the Panel with evidence of significant lost sales amounting to tens of billions of dollars in lost revenue for the U.S. LCA industry, all caused by subsidies that enabled Airbus to offer and sell LCA that would have been unavailable otherwise.[91] The EU in its first written submission barely engaged with the U.S. campaign-specific evidence.[92] Where it did so, it was unable to cite any non-attribution factors addressing the subsidies' role in providing Airbus with the aircraft that it sold.[93] The EU apparently had second thoughts about this approach, mentioning for the first time in its second written submission a host of campaign-specific arguments.[94] These newly contrived arguments, however, do not change the basic facts surrounding the demonstrated lost sales and are not enough to sever the causal connection between the subsidies and the aircraft sold by Airbus.

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[87] US SWS, para. 715.

[88] *US – Upland Cotton (21.5) (AB)*, para. 237.

[89] US SWS, paras. 718-747.

[90] US SWS, paras. 722-723, 728-729, 733-734, 739-740, 743-746.

[91] Exhibit USA-164.

[92] US SWS, para. 676.

[93] US SWS paras. 680-688.

[94] EU SWS paras. 1216-1556.

E. Conclusion

106. In conclusion to our public statement today, the United States appears before the Panel because the situation has not gotten better, it's gotten worse:

- The EU has refused to withdraw the subsidies.
- EU member States have provided additional LA/MSF to the A350 XWB.
- Airbus still supplies the market with a product line that it would not have without LA/MSF.
- Consequently, Boeing continues to lose sales and market share worth many billions of dollars.

107. In light of the evidence and argumentation presented, the United States respectfully requests that the Panel work quickly to confirm the EU's failure to comply with the DSB recommendations and rulings in *EC – Large Civil Aircraft*. An end to LA/MSF and other subsidies as usual, is long overdue.